

STATE OF MICHIGAN
COURT OF APPEALS

LOUIS KIRCOS,

Plaintiff/Counter-Defendant-
Appellant,

v

TONY WASLAWSKI and RHONDA
WASLAWSKI,

Defendants/Counter-Plaintiffs-
Appellees,

and

SHARON SEELYE, GARY PORE, and MARY
PORE,

Intervening Defendants/Counter-
Plaintiffs-Appellees.

UNPUBLISHED

May 11, 2010

No. 288894

Lenawee Circuit Court

LC No. 07-072634-CH

Before: CAVANAGH, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Plaintiff Louis Kircos appeals as of right from the trial court's judgment, following a bench trial, resolving a property dispute between plaintiff and property owners in the Clearwater Beach Addition No. 1 subdivision in Woodstock Township (the "subdivision"). In particular, the trial court determined that (1) Highland Avenue extends to the shore of Devils Lake and provides access to the lake over an area 18.4 feet wide as measured from the edge of plaintiff's property, (2) defendants Tony and Rhonda Waslawski, intervening defendants Sharon Seelye and Gary and Mary Pore (collectively, "defendants"), and other backlot property owners in the subdivision were entitled to place a dock and moor boats from the shore of the access area and to use the access area for specified recreational purposes, and (3) the parties were prohibited from interfering with each other's permitted uses of the respective properties. We affirm.

Plaintiff owns a triangular lot adjacent to Highland Avenue. Highland Avenue is part of the Clearwater Beach Addition No. 1 subdivision. Plaintiff's property is not part of the subdivision. At issue in this case is whether Highland Avenue extends to the shore of Devils Lake and whether plaintiff's triangular lot to the immediate west is riparian such that its lot line

extends to the shore of Devils Lake, thereby impeding any access to the lake from Highland Avenue.

On appeal, plaintiff first argues that the trial court erred to the extent that it did not find that his triangular lot was riparian. Plaintiff also argues that the trial court erred in finding that Highland Avenue extended to the water's edge and into section 27 of Woodstock Township, where his property is located. Although we agree that plaintiff's triangular lot is riparian, we also conclude that the trial court did not err in finding that the boundaries of plaintiff's property are those stated in the metes and bounds description of his deed, and that Highland Avenue extends to the shore of Devils Lake, thereby providing an 18.4-foot-wide area to access the lake.

A "claim to establish title as sole riparian owner, or to quiet title, is equitable in nature and is reviewed de novo by this Court." *2000 Baum Family Trust v Babel*, 284 Mich App 544, 550; 773 NW2d 44 (2009), lv gtd 485 Mich 1047 (2010). The trial court's findings of fact in an equity case are reviewed for clear error. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994). "The clear error standard provides that factual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). Regard is given to the trial court's special opportunity to evaluate the credibility of witnesses who appeared before it. *Morris v Clawson Tank Co*, 459 Mich 256, 271; 587 NW2d 253 (1998); MCR 2.613(C).

Although the trial court did not expressly decide whether plaintiff's triangular lot was riparian, it stated that the lot did not extend to the water's edge, and thus it implicitly found that the lot was not riparian. Conversely, in its final order the trial court stated that Highland Avenue extended to the water's edge, thereby implicitly finding that Highland Avenue is riparian.

It is well settled that "[l]and that includes, borders, or is bound by water is considered riparian land." *2000 Baum Family Trust*, 284 Mich App at 551. "Generally, it is an 'indispensable requisite' that riparian land actually touch the water." *Id.*, quoting *Hilt v Weber*, 252 Mich 198, 218; 233 NW 159 (1930). A riparian owner enjoys certain exclusive rights, such as "the right to the exclusive use of the bank and the shore, including the right to erect and maintain docks, as well as to permanently anchor boats off the shore." *Id.* "Normally, 'the interposition of fee title between upland and water destroys riparian rights, or rather transfers them to the interposing owner.'" *Id.*, quoting *Hilt*, 252 Mich at 218.

Plaintiff obtained title to the triangular lot in 1985 through a deed from Lloyd Parkhurst. An inquiry into the scope of the interest granted to plaintiff by the Parkhurst deed "necessarily focuses on the deed's plain language." *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 370; 699 NW2d 272 (2005). The inquiry is guided by the following principles:

"(1) In construing a deed of conveyance[,] the first and fundamental inquiry must be the intent of the parties as expressed in the language thereof; (2) in arriving at the intent of parties as expressed in the instrument, consideration must be given to the whole [of the deed] and to each and every part of it; (3) no language in the instrument may be needlessly rejected as meaningless, but, if

possible, all the language of a deed must be harmonized and construed so as to make all of it meaningful; (4) the only purpose of rules of construction of conveyances is to enable the court to reach the probable intent of the parties when it is not otherwise ascertainable.” [*Id.*, quoting *Purlo Corp v 3925 Woodward Avenue, Inc*, 341 Mich 483, 487-488; 67 NW2d 684 (1954) (internal citations omitted).]

Thus, the “objective in interpreting a deed is to give effect to the parties’ intent as manifested in the language of the instrument.” *Id.*

In the present case, the deed for plaintiff’s triangular lot contains the following description of the property conveyed:

A parcel of land in the Southeast 1/4 of Section 27, Town 5 South, Range 1 East, Woodstock Township, Lenawee County, Michigan, being more specifically described as: Commencing at the East 1/4 Post of said Section 27; thence South 1425.60 feet along the East line of said Section 27 to the South Corner of Lot 66, Clear Water Beach Addition No. 1, a recorded plat, as recorded in Liber 7 of Plats, page 26, Lenawee County Records, for the point of beginning of this description; thence continuing South 63.50 feet along the East line of said section 27 *to the shore of Devil’s Lake*; thence North 35° 29’ West 28.49 feet *along the shore of Devil’s Lake* to a point on the Westerly line of Highland Avenue, extended; thence North 22° 19’ East 43.56 feet along the Westerly line of Highland Avenue, extended to the point of beginning. [Emphasis added.]

Thus, plaintiff’s deed contains a metes and bounds description that ends at the southern boundary of the subdivision, extended west. However, plaintiff’s deed also states that the property extends *to the shore and along the shore* of Devils Lake, even though the metes and bounds measurements do not bring the property to the shoreline. These two seemingly contradictory statements must be harmonized if possible, and no language should be rendered nugatory. The only way to harmonize these provisions is to accept that the shore of Devils Lake was formerly located at the approximate southern edge of the plat, but has since receded. Indeed, the attorneys at trial theorized that this was the case. If so, plaintiff’s triangular lot is riparian, a conclusion that is also supported by the language of the deed. But so is Highland Avenue, which extends to the same southern boundary as the metes-and-bounds description of plaintiff’s lot. We also note that there was no evidence that land between the lakeshore and the metes and bounds description of plaintiff’s lot was retained by the grantor (Parkhurst) or conveyed to anyone else. The same is true with any land located between the southern boundary of Highland Avenue and the water’s edge.

Considering the language of the Parkhurst deed and the fact that there is no intervening property owner between plaintiff’s triangular lot and the water, we are left with the conclusion that plaintiff’s triangular lot is riparian. Conversely, while the subdivision plat does not show Highland Avenue extending to the water’s edge, there is no evidence that the grantor reserved ownership of any intervening land or that any intervening land was conveyed to anyone else. Thus, the trial court correctly ruled in its written opinion and order that Highland Avenue ended at the shore of Devils Lake, meaning that it is riparian. However, simply determining that Highland Avenue and plaintiff’s triangular lot are both riparian does not resolve whether the trial

court improperly granted the subdivision property owners an easement, based on the plat dedication, over land that actually belongs to plaintiff. Plaintiff argues that because his property is riparian, his lot line extends to the water's edge, impeding any access to the lake from Highland Avenue. In this regard, we disagree.

Although plaintiff's property is riparian, the trial court correctly found that the legal boundaries of his property are those described by metes and bounds in his deed. In other words, plaintiff is not entitled to cut off the subdivision property owners' access to the lake by simply extending the boundary lines of his property until they reach the edge of the water.

In *Heeringa v Petroelje*, 279 Mich App 444, 447; 760 NW2d 538 (2008), this Court stated:

[T]he proper method for determining riparian boundary lines involving irregularly shaped bodies of water is: first, to draw a "thread" line through the geographic middle (as opposed to the deepest point) of the body of water; second, to determine where the riparian landowners' surface property lines intersect with the water; and third, to draw lines from the thread at as close to right angles as possible *as measured at the thread line* to the "landward terminus points." The thread line must be determined on the basis of the shape of the "original" shoreline, referring to the date the United States government parted with title to the property.

The goal of this process is to equitably apportion useful riparian rights among riparian landowners, according to the relative shoreline lengths of their various properties. *Id.* at 448, 453. Any other rule would subject riparian owners to having their lake access cut off where the shore curves in such a way that their neighbor's shore line would cross in front of the property. *Id.* at 450. That is precisely what plaintiff seeks to do in this case.

In this case, the trial court found that the subdivision property owners had an 18.4-foot-wide easement to the shore of the lake. The trial court was aware of the principle that if a lake recedes, riparian rights are extended perpendicular to the lake, not by extending the property lines in the manner proposed by plaintiff. However, neither party introduced the patented government survey of the lake (known as the "GLO survey") or any other evidence of the original location of the shoreline of Devils Lake for purposes of determining plaintiff's (and Highland Avenue's) riparian rights.¹

¹ In *Heeringa*, this Court considered the trial court's ruling that the location of the original shoreline is determined solely by reference to the United States patented government survey of the lake and the surrounding land to the state of Michigan (the "GLO survey"). *Heeringa*, 279 Mich App at 451-452. This Court found that the pertinent caselaw did not support such an absolute requirement and that "[a]lthough the [GLO] meander lines were presumed correct in the absence of evidence to the contrary, the actual location of the water itself is the true boundary, even in a GLO plat." *Id.* at 452. "[U]ltimately, the thread depended on the shoreline as determined by all available evidence, not on the GLO survey meander lines alone." *Id.* at 452- (continued...)

Nonetheless, given the record evidence, i.e., the plat boundaries, the metes and bounds description contained in the Parkhurst deed, and the lack of evidence of any intervening property owners, we are not left with a definite and firm conviction that the trial court made a mistake in deciding that plaintiff's property did not extend beyond his metes and bounds description and that defendants have an 18.4-foot-wide easement to the water's edge, perpendicular to the lake and beginning at the southern boundary of Highland Avenue as depicted in the subdivision plat, which does not traverse over plaintiff's property.

Plaintiff also argues that the trial court erred in finding that the plat dedication was ambiguous and that the historical course of use allowed defendants to continue using the easement to moor and dock boats, and for lounging, sunbathing, and picnicking. We again disagree. The extent of a party's rights under an easement is a question of fact, which we review for clear error. *Dyball v Lennox*, 260 Mich App 698, 703; 680 NW2d 522 (2004).

Where the language of an easement is plain and unambiguous, the dedication is to be enforced as written, without considering extrinsic evidence. *Id.* at 704. However, if the language is ambiguous, extrinsic evidence may be considered to determine the scope of the easement. *Id.* That includes not only the language used, but also evidence of the circumstances existing at the time the easement was granted. *Id.*

Erecting and maintaining a dock at the water's edge is a riparian right. *Id.* at 705. However, an easement for access to and from the water's edge grants only a right of way to the water and "does not give rise to riparian rights." *Id.* at 706. But, "Michigan law clearly allows the original owner of riparian property to grant an easement to backlot owners to enjoy certain rights that are traditionally regarded as exclusively riparian." *Id.*, quoting *Little v Kin*, 249 Mich App 502, 504-505; 644 NW2d 375 (2002). Thus, a dedication may allow backlot owners to maintain a dock, even though maintaining a dock is a riparian right. *Id.* at 708.

In the present case, the plattor did not grant plat owners an easement over lots belonging to other plat owners. Rather, he dedicated all roads and alleys in the plat "to the use of the property owners of said plat." As discussed above, Highland Avenue is riparian. Therefore, the plattor could grant all plat owners an easement to enjoy Highland Avenue's riparian rights. The language of the dedication in the plat is not confined to granting an easement for ingress and egress, i.e., simple access to the lake. By the same token, the language does not explicitly grant riparian rights either. Therefore, the trial court did not err in finding that the plat dedication was ambiguous. Accordingly, the court was entitled to consider extrinsic evidence concerning the scope of the easement.

Contrary to what plaintiff argues, the trial court did not consider inadmissible hearsay evidence concerning the scope of the easement. Rather, Sharon Seelye testified that she lived with her grandparents until she started the first grade in 1957 or 1958, and that as far back as she could remember, her grandparents always had a dock at the end of Highland Avenue. Because that testimony is based on Seelye's personal knowledge and does not involve an out-of-court

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statement, it is not hearsay. MRE 801. Indeed, the trial court sustained plaintiff's hearsay objection to what Seelye was told concerning the right to lake access.

Next, plaintiff argues that even assuming the dedication is ambiguous, the trial court erred in considering evidence of later uses, rather than only evidence of the conditions existing at the time the easement was created. We disagree.

In *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 103; 662 NW2d 387 (2003), this Court held that "in the absence of evidence that the historical uses of the road ends were contemporaneous with the dedication, the road-end activity occurring *after* the dedication are [sic] not helpful in determining the dedicators' intent." However, the *Gerrish Twp* case involved a dispute concerning the scope of rights granted by a dedication of the subdivision's streets and alleys "to the use of the public." *Id.* at 88. No public dedication is at issue in the present case.

Conversely, in *Dobie v Morrison*, 227 Mich App 536, 537; 575 NW2d 817 (1998), this Court considered whether the dedication of a park to "the use of the owners of lots in this plat which have no lake frontage" granted them fee title or simply an easement. The *Dobie* Court held that in determining the platters' intent, a court should consider "the language used in connection with the facts and circumstances existing at the time of the grant." *Id.* at 540. After finding that the dedication created an easement, the *Dobie* Court found that the trial court did not err in concluding that the defendant plat owners could continue to use the park as they had done "traditionally and historically" for picnicking, swimming, fishing, sunbathing, constructing a dock, and seasonal mooring, because the trial court properly found that such uses were within the scope of the easement and did not unreasonably interfere with the plaintiffs' use and enjoyment of their property. *Id.* at 541-542.

In this case, the parties did not introduce evidence of the facts and circumstances existing in 1937, when the plat was dedicated. Rather, Seelye testified that as far back as she could remember, her grandparents had a dock at that location. Other witnesses recalled that there had always been a shared dock at the end of Highland Avenue, which was used for fishing, swimming, seasonal mooring, and lounging. Even plaintiff had a dock at the end of Highland Avenue in 1981, before purchasing his triangular lot. There was also substantial evidence that Highland Avenue had been used for winter recreation since at least 1989, and that there was a seasonal dock at the end of Highland Avenue every year since at least 1990, except for 1991.

Plaintiff did not dispute the existence or uses of the common dock, only its precise location from one year to the next. Moreover, plaintiff's witnesses testified that the bottomlands at the water's edge were very mucky and unsuitable for putting in or taking out a boat. Thus, a right of access for boating, fishing, and swimming would be meaningless without a structure to access the lake.

Given the available evidence showing the uses that lot owners traditionally and historically engaged in over the easement, which the trial court found did not unreasonably

interfere with plaintiff's use of his property, we are not left with a definite and firm conviction that the trial court erred in finding that the easement allowed the subdivision property owners "access to the lake to place a dock, moor boats, picnic, launch and retrieve boats, swim, fish, ice skate, snowmobile and sled."²

Affirmed.

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder

² Plaintiff also argues that defendants failed to prove that they acquired a prescriptive easement to access the lake. Because the trial court found that defendants had an easement by virtue of the plat dedication, which did not cross over plaintiff's property, it did not reach the issue whether defendants had a prescriptive easement to use a portion of plaintiff's property. Because we agree with the trial court, it is unnecessary for us to consider whether defendants acquired a prescriptive easement. Further, although we find merit in defendants' argument that plaintiff's claims are barred by the doctrine of laches, it is unnecessary for us to address this argument.